Supreme Court, U.S.
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No. 93-1921

In the Supreme Court of the United States

OCTOBER TERM, 1994

ERNESTO ALEOTTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Constitution required the trial judge to inquire *sua sponte* whether petitioner was knowingly and voluntarily waiving his right to testify in his defense.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 61-63) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1994. The petition for a writ of certiorari was filed on May 27, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

Following a jury trial in the Superior Court of the District of Columbia, petitioner was convicted on one count of malicious destruction of property, in viola-

tion of D.C. Code § 22-403 (1981). He was sentenced to 12 months' probation and 40 hours of community service, and ordered to pay $140.98 in restitution to the complainant. The District of Columbia Court of Appeals affirmed. Pet. App. 61-63; Gov't C.A. Br. 1-2.

1. Petitioner and Patricia Barrs, the complainant, lived together for more than ten years. On January 1, 1990, Barrs moved out, and one year later she completely severed her relationship with petitioner. Petitioner continued to contact Barrs and her friends, however, and became very angry when Barrs told him not to contact her any longer. Gov't C.A. Br. 2.

Between April and May 1991, Barrs' car tires were damaged several times. On May 2, 1991, Barrs contacted the police and told them she suspected petitioner was responsible for the damage. She made arrangements to have police surveillance of her car the following day. Gov't C.A. Br. 2-3.

On May 3, 1991, Barrs parked her car in front of an apartment building on the east side of Connecticut Avenue, N.W., in Washington, D.C. Before going inside the building, she checked her tires and noted that they were fully inflated. Shortly thereafter, Sergeant John Hickey of the Metropolitan Police Department arrived at the building and also examined the tires to ensure that they were fully inflated. Sergeant Hickey then set up a video camera inside a van with tinted windows directly across from the apartment building into which Barrs had gone. Sergeant Hickey filmed persons approaching Barrs' car and, from time to time, the car tires. Gov't C.A. Br. 3-4.

From his vantage in the police van, Sergeant Hickey first saw petitioner walking toward the van on

the otherwise deserted street. Petitioner crossed the street, walked past Barrs' car, looked up at the apartment building, and returned to Barrs' car. Sergeant Hickey saw petitioner crouch down as he approached the front tire on the passenger side of Barrs' car and make a motion with his arm. Petitioner then got up, walked to the rear tire, crouched down, and repeated the same arm motion. The front passenger side of the car took a distinctive dip. Gov't C.A. Br. 4.

Sergeant Hickey arrested petitioner as he walked away from the car. Returning to Barrs' car, Sergeant Hickey noticed that the tires on both the front and rear passenger side of the car were flat. Gov't C.A. Br. 4-5.

2. After a jury trial at which he did not testify, petitioner was found guilty. At his sentencing hearing, the trial court held an ex parte bench conference with petitioner and his trial counsel to tell them she had received four letters alleging that petitioner had received ineffective assistance of counsel. The court noted that petitioner had not demonstrated any dissatisfaction with his trial counsel, Robert Boraks, and that he appeared to be capable of raising any such claim on his own. When the judge asked petitioner if he was satisfied with his counsel, he replied that he was not. Petitioner stated that he had wanted to testify at trial and had so informed his trial counsel. The trial court continued the sentencing to enable petitioner to retain new counsel. Gov't C.A. Br. 6; 12/18/92 Tr. 2-13, 17-21.

At the hearings on petitioner's motion for a new trial, petitioner testified that he knew he had the right to testify in his own behalf and that he had

fully intended to testify at trial. Petitioner stated that his initial trial counsel, Allen Dale, had prepared him to testify, and that when Robert Boraks took over his representation, the defense plan discussed by Dale, Boraks, and petitioner included petitioner's testimony.[1] Petitioner claimed that he was "shocked" when his attorney rested the defense case without putting petitioner on the stand. At that point, petitioner said, he grabbed Boraks' arm, but Boraks silenced him. Gov't C.A. Br. 6-7; 2/1/93 Tr. 15-25.

Petitioner admitted that he had informed the trial court about his desire to testify for the first time at the sentencing hearing. He claimed that he had been afraid to say anything to the court before because he had been admonished to refrain from making facial gestures during the testimony of the government's witnesses. Petitioner also testified that Boraks never discussed trial strategy or his testimony with him. Gov't C.A. Br. 8; 2/1/93 Tr. 23-25, 54-59.

Boraks, a criminal defense lawyer with more than 20 years' experience, testified that he had originally planned to put petitioner on the stand, following Dale's trial strategy. One month before trial, however, he made the tactical decision that petitioner should not testify. Boraks explained that he was concerned about the jury's ability to understand petitioner's accent, petitioner's emotional attachment to the case, the credibility of petitioner's story, and the fact that that story helped to fill in several of the gaps in the government's case. Boraks discussed the

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[1] Petitioner originally retained Dale to represent him. Dale suggested that Boraks replace him, however, when petitioner moved to dismiss the case on the ground that the government had tampered with the car tires, and it appeared that Dale would be needed as a witness. 2/1/93 Tr. 2-12.

issue with several other attorneys, as well as with petitioner. Boraks stated that petitioner had agreed to follow his advice. Gov't C.A. Br. 9; 2/1/93 Tr. 120, 122-132, 145.

Boraks also testified that petitioner never expressly said he wanted to testify at any point before, during, or after the trial, and that petitioner did not grab his arm when Boraks rested the defense case. While petitioner gave Boraks many ideas about his defense throughout the trial, he never disagreed with Boraks about the decision not to testify, nor did he express any displeasure with Boraks until his sentencing. Moreover, following a telephone call from Dale during trial, Boraks asked petitioner if he was dissatisfied with the trial and wanted to testify. Petitioner told Boraks he respected Boraks' judgment, and not to worry. Gov't C.A. Br. 10; 2/1/93 Tr. 131-136, 146, 163-164.

3. The trial court denied petitioner's motion for a new trial. The court held that there was no question petitioner knew he had the right to testify. It also found Boraks' testimony more credible than that of petitioner, noting that Boraks was an "esteemed criminal lawyer" with a great deal of experience and without reason to fabricate. The court also held that petitioner had understood and agreed with Boraks' tactical decision that he not testify. Moreover, the court had observed no indications at trial that petitioner was dissatisfied with Boraks' representation of him. Given the totality of circumstances, the court concluded that Boraks had fully counselled petitioner about testifying and that petitioner had accepted Boraks' advice. Gov't C.A. Br. 11-12; 3/19/93 Tr. 30-36.

4. The District of Columbia Court of Appeals affirmed. Pet. App. 61-63. The court held that it could not "second-guess" the credibility determination made by a trial court that had observed the witnesses and assessed their demeanor. *Id.* at 62. The court also reaffirmed its earlier holding in *Woodward* v. *United States*, 626 A.2d 911, 913-915 (D.C. App. 1993), that the trial court is not required to ask, *sua sponte*, whether a defendant wishes to testify. Pet. App. 63.

ARGUMENT

1. Petitioner renews his contention (Pet. 11-15, 18-60) that the trial court was required to advise him of his constitutional right to testify and to determine whether his wavier of that right was a knowing and voluntary one. That contention lacks merit. The Constitution protects the right of a criminal defendant to testify in his own defense. *Rock* v. *Arkansas*, 483 U.S. 44, 49-53 (1987); *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975); *Brooks* v. *Tennessee*, 406 U.S. 605, 612 (1972). The trial judge, however, is not required to inform a defendant who is represented by counsel that he has a right to testify, or to question the defendant about whether his decision not to testify (*i.e.*, to assert his Fifth Amendment right to remain silent) is a knowing and voluntary one. See *United States* v. *Campione*, 942 F.2d 429, 439 (7th Cir. 1991); *United States* v. *McMeans*, 927 F.2d 162, 163 (4th Cir. 1991) (per curiam); *United States* v. *Edwards*, 897 F.2d 445, 446-447 (9th Cir.), cert. denied, 498 U.S. 1000 (1990); *United States* v. *Bernloehr*, 833 F.2d 749, 751-752 (8th Cir. 1987); *Siciliano* v. *Vose*, 834 F.2d 29, 30 (1st Cir. 1987); *United States* v. *Janoe*, 720 F.2d 1156, 1161 (10th Cir. 1983), cert. denied, 465 U.S. 1036 (1984); see

also *United States* v. *Teague*, 953 F.2d 1525, 1532-1533 & n.8 (11th Cir.) (en banc) (expressing the view that it would be "inappropriate" to require trial court to discuss the decision whether to testify with the defendant), cert. denied, 113 S. Ct. 127 (1992).

The decision whether to testify is, in large part, a matter of trial strategy. While the ultimate decision whether to testify belongs to the client, the discussions leading up to that decision are traditionally the preserve of counsel and client alone. See *United States* v. *Martinez*, 883 F.2d 750, 760-761 (1989), vacated on other grounds, 928 F.2d 1470 (9th Cir.), cert. denied, 111 S. Ct. 2886 (1991). It is the responsibility of defense counsel—not the trial judge—to inform the defendant of his right to testify and to outline the considerations relevant to the exericse of that right. *Teague*, 953 F.2d at 1533; see *Hollenbeck* v. *Estelle*, 672 F.2d 451, 453 (5th Cir.), cert. denied, 459 U.S. 1019 (1982).

To require the trial court to ask about a defendant's failure to testify would risk intruding into the attorney-client relationship and interfering with defense strategy. *Teague*, 953 F.2d at 1533 n.8; *Campione*, 942 F.2d at 439; *Bernloehr*, 833 F.2d at 752 n.3. In addition, by advising the defendant of his right to testify, the trial court "could inappropriately influence the defendant to waive his constitutional right *not* to testify, thus threatening the exercise of this other, converse, constitutionally explicit, and more fragile right." *Siciliano*, 834 F.2d at 30; *Martinez*, 883 F.2d at 760.

Here, the trial court found that petitioner knew of his right to testify and voluntarily waived that right. At the post-trial hearing, petitioner testified that he knew of his right to testify because he had

discussed and prepared his testimony with his original attorney, Dale. The trial court credited Boraks' testimony that petitioner neither objected nor expressed any other sign of displeasure when Boraks did not put petitioner on the stand and rested the case. The trial court also believed Boraks' testimony that petitioner had never insisted upon testifying and that the two had agreed that, for tactical reasons, he would not take the stand. In those circumstances, the trial court properly concluded that petitioner waived his right to testify. See *United States* v. *Joelson*, 7 F.3d 174, 177 (9th Cir.) (waiver inferred from defendant's conduct), cert. denied, 114 S. Ct. 620 (1993); *McMeans*, 927 F.2d at 163 (where defendant knew of his right to testify, his failure to testify was of his own choosing); *United States* v. *Systems Architects, Inc.*, 757 F.2d 373, 375 (1st Cir.) (accused "must act affirmatively" to express his desire to testify), cert. denied, 474 U.S. 847 (1985).

2. Petitioner contends (Pet. 11-12, 42, 53-60) that the courts are divided over whether the trial court must make an inquiry at trial, *sua sponte*, into whether the defendant understands and has voluntarily waived his constitutional right to testify. As discussed above, all of the federal courts of appeals that have considered the issue have held that the trial court does not have such an obligation.[2] The major-

[2] Contrary to petitioner's assertion (Pet. 54), the Ninth Circuit did not hold in *United States* v. *Martinez, supra,* that the trial court must conduct an on-the-record colloquy concerning the defendant's right to testify. Rather, the court held that waiver of that right could be inferred from a counseled defendant's failure to testify at trial. The trial court "has no duty to advise the defendant of his right to testify, nor is the court required to ensure that an on-the-record waiver has occurred. The defendant's conduct provides

ity of state courts, including the court below, have also declined to require the trial court to inform the defendant of his right to testify and to conduct an on-the-record colloquy on the voluntariness of his waiver.[3] See, *e.g.*, *Woodward* v. *United States*, 626 A.2d at 913-915; *Taylor* v. *State*, 843 P.2d 682, 688 (Kan. 1992); *State* v. *Hamm*, 818 P.2d 830, 833 (Mont. 1991); *State* v. *Savage*, 577 A.2d 455, 473 (N.J. 1990); *Aragon* v. *State*, 760 P.2d 1174, 1178-1179 (Idaho 1988); *Torres-Arboledo* v. *State*, 524 So. 2d 403, 409-411 (Fla.), cert. denied, 488 U.S. 901 (1988); *Commonwealth* v. *Waters*, 506 N.E.2d 859, 865 (Mass. 1987); *People* v. *Simmons*, 364 N.W.2d 783, 784-785 (Mich. Ct. App. 1985); *State* v. *Allie*, 710 P.2d 430, 438 (Ariz. 1985); *In re Mecier*, 460 A.2d 472, 475-476 (Vt. 1983); *State* v. *Albright*, 291 N.W.2d 487, 491-493 (Wis.), cert. denied, 449 U.S. 957 (1980); see also *State* v. *El-Tabech*, 453 N.W.2d 91, 95 (Neb. 1990).

A handful of state courts have required the trial court to conduct an on-the-record colloquy with the

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a sufficient basis from which to infer that the right to testify has been waived." 883 F.2d at 760.

[3] Petitioner correctly states (Pet. 39-40) that in *Boyd* v. *United States*, 586 A.2d 670 (D.C. App. 1991), the court required the trial court to inquire whether defendant's waiver of her right was voluntary. The inquiry at issue in *Boyd*, however, arose after the defendant made known her desire to testify. *Id.* at 677. The court held that once a trial judge is aware that the defendant wanted to testify but did not, the judge has a duty to hold a hearing to determine whether the defendant voluntarily waived his right. *Ibid.* The court declined to decide whether a trial court has the duty to conduct a colloquy during trial, *sua sponte*, informing the defendant of his right to testify. *Id.* at 677-678.

defendant to inform him of his right to testify and to ascertain whether he has knowingly, intentionally, and voluntarily waived that right. See *LaVigne* v. *State*, 812 P.2d 217, 222 (Alaska 1991); *State* v. *Neuman*, 371 S.E.2d 77, 81-82 (W. Va. 1988); *People* v. *Curtis*, 681 P.2d 504, 514 (Colo. 1984); see also *Culberson* v. *State*, 412 So. 2d 1184, 1186 (Miss. 1982) (suggesting that trial court advise defendant, on the record, of the right to testify where the defendant has not testified). In our view, those decisions place burdens on trial judges beyond what the Constitution requires. This case, however, does not present an appropriate occasion to address the issue. As the trial court found, petitioner knew he had the right to testify, indicated his agreement with his attorney's tactical decision not to put him on the stand, and made no objection until sentencing. The trial court did not believe petitioner's post-verdict testimony that he had expected to testify and had not agreed with his attorney not to testify. The trial court also determined that petitioner's waiver of his right to testify was knowing and voluntary. In the face of those findings, a prophylactic rule requiring the trial court to inform the defendant of his right to testify would not have benefitted petitioner. Resolution of the issue by this Court, if warranted, should await a case in which the Court's decision might affect the outcome.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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